Supreme Court, U.S.
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No. 97-126

In The

Supreme Court of the United States

October Term, 1996

JEAN G. MATTERN,

Petitioner,

vs.

EASTMAN KODAK COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 704(a) of Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing] against" employees who challenge perceived violations of other prohibitions in Title VII. Does § 704(a) permit an employee to obtain relief for alleged employer conduct that results in no objective detrimental effect on the employment relationship?

PARTIES TO THE PROCEEDING

The petitioner is Jean G. Mattern, plaintiff-appellee below.

The named respondents, defendants-appellants below, are "Eastman Kodak Company and Eastman Chemical Company doing business as Texas Eastman Company." As stipulated below, the correct defendant was Eastman Chemical Company, of which Texas Eastman Company is a division. VII R. 7-8. Eastman Kodak Company has no interest in this case.

Eastman Chemical Company has no parent company. The following are nonwholly owned subsidiaries of Eastman Chemical Company: Genencor International Inc.; HDK Industries; Kingsport Hotel Limited Liability Corporation; Primester; Southern BioSystems, Inc.; Enterprise Genetics, Inc.; and Bellpack.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
Reasons For Denying The Writ	3
I. The Circumstances Of This Case Make Review Inappropriate.	3
II. There Is No Real And Substantial Conflict In The Circuits That Warrants This Court's Review.	8
A. The Views of the Other Circuit Courts.	12
B. The Fifth Circuit's View	20
C. Policy Concerns Support the Fifth Circuit's View	23
III. The Fifth Circuit's Decision Does Not Conflict With Any Decision Of This Court.	24
Conclusion	28

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Adams v. Bethlehem Steel Corp., 736 F.2d 992 (4th Cir. 1984) 11

Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520 (2d Cir.), *cert. denied*, 506 U.S. 965, 113 S. Ct. 440 (1992) 15, 23

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996) 22

Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) .. 18, 25

Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1105, 109 S. Ct. 3155 (1989) 20

Berry v. Stevinson Chevrolet, 74 F.3d 980 (10th Cir. 1996) 18

Boyle v. United Tech. Corp., 487 U.S. 498, 108 S. Ct. 2510 (1988) 7

Bradford v. Norfolk S. Corp., 54 F.3d 1412 (8th Cir. 1995) 14

Burns v. AAF-McQuay, Inc., 96 F.3d 728 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997) 22

Contents

	Page
Cesaro v. Lakeville Community Sch. Dist., 953 F.2d 252 (6th Cir.), *cert. denied*, 506 U.S. 867, 113 S. Ct. 195 (1992)	13
Chertkova v. Connecticut Gen. Life Ins. Co., 92 F.3d 81 (11th Cir. 1996)	22
Cole v. Ruidoso Mun. Schs., 43 F.3d 1373 (10th Cir. 1994)	18
Collins v. State of Illinois, 830 F.2d 692 (7th Cir. 1987)	15
Commissioner v. Schleier, 515 U.S. 323, 115 S. Ct. 2159 (1995)	11
Crady v. Liberty Nat'l Bank & Trust Co. of Ind., 993 F.2d 132 (7th Cir. 1993)	14
Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997)	28
Deavenport v. MCI Tel. Corp., 1997 WL 467160, *8 (D. Col. Aug. 13, 1997)	22, 23
DeNovellis v. Shalala, __ F.3d __, 1997 WL 527912 (1st Cir. Sept. 2, 1997)	4
Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995)	12, 22
Easley v. West, 66 Fair Empl. Prac. Cas. (BNA) 1634 (E.D. Pa. 1994)	6

Contents

Page

EEOC v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) 25

Flaherty v. Gas Research Inst., 31 F.3d 451 (7th Cir. 1994) 14, 28

Gartman v. Gencorp Inc., 120 F.3d 127 (8th Cir. 1997) 22

Gary v. Long, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995) 20

Geisler v. Folsom, 735 F.2d 991 (6th Cir. 1984) 13

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982) 21

Harlston v. McDonnell Douglas Corp., 37 F.3d 379 (8th Cir. 1994) 14

Harris v. Forklift Sys., Inc., 510 U.S. 17, 114 S. Ct. 367 (1993) 4, 5, 6, 9, 22, 24

Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) ... 19, 25

Henry v. Guest Servs., Inc., 902 F. Supp. 245 (D.D.C. 1995) *aff'd*, 98 F.3d 646, 1996 WL 560362 (D.C. Cir. 1996) 6, 20

Hopkins v. Baltimore Gas and Elec. Co., 77 F.3d 745 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996) 12

Contents

	Page
Hystro Prods., Inc. v. MNP Corp., 18 F.3d 1384 (7th Cir. 1994)	7
International Union, United Aerospace and Agricultural Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 111 S. Ct. 1196 (1991)	22
Jones v. Reagan, 696 F.2d 551 (7th Cir. 1983)	11
Jordan v. Wilson, 851 F.2d 1290 (11th Cir. 1988)	18
Kilgore v. Thompson & Brock Mgmt., Inc., 93 F.3d 752 (11th Cir. 1996)	22
Lawrence v. National Westminster Bank N.J., 98 F.3d 61 (3d Cir. 1996)	11
Lawson v. McPherson, 679 F. Supp. 28 (D.D.C. 1986)	23
Ledergerber v. Stangler, __ F.3d __, 1997 WL 545970 (8th Cir. Sept. 8, 1997)	14
Martin v. Frank, 788 F. Supp. 821 (D. Del. 1992)	23
McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 157, 35 S. Ct. 69 (1914)	11
McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996)	14
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973)	26

Contents

Page

Meredith v. Beech Aircraft Corp., 18 F.3d 890 (10th Cir. 1994) 18

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399 (1986) 4, 6, 9, 24, 25

Montandon v. Farmland Indus., Inc., 116 F.3d 355 (8th Cir. 1997) 13, 28

Moore v. Murphy, 47 F.3d 8 (1st Cir. 1995) 7

Mosley v. Pena, 100 F.3d 1515 (10th Cir. 1996) 18

Nelson v. Upsala College, 51 F.3d 383 (3d Cir. 1995) 16, 17

Nidds v. Schindler Elevator Corp., 113 F.3d 912 (9th Cir. 1997), *petition for cert. filed*, No. 97-364 (July 29, 1997) 19

Niehus v. Liberio, 973 F.2d 526 (7th Cir. 1992) 11

Page v. Bolger, 645 F.2d 227 (4th Cir.), *cert. denied*, 454 U.S. 892, 102 S. Ct. 388 (1981) 12

Passer v. American Chem. Soc'y, 935 F.2d 322 (D.C. Cir. 1991) 20

Patel v. Allstate Ins. Co., 105 F.3d 365 (7th Cir. 1997) 23

Contents

	Page
Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775 (1989)	10
Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 113 S. Ct. 1920 (1993)	21
Rabinovitz v. Pena, 89 F.3d 482 (7th Cir. 1996)	22
Reeder-Baker v. Lincoln National Corp., 834 F.2d 1373 (7th Cir. 1987)	15
Reynolds v. CSX Transp., Inc., 115 F.3d 860 (11th Cir. 1997)	18
Robinson v. City of Pittsburgh, __ F.3d __, 1997 WL 386102 (3d Cir. July 14, 1997)	16, 17
Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997)	24, 25
Ruedlinger v. Jarrett, 106 F.3d 212 (7th Cir. 1997)	25
Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729 (1990)	25, 27, 28
Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406 (9th Cir.), *cert. denied*, 117 S. Ct. 295 (1996)	22
Serrano-Cruz v. DFI Puerto Rico, Inc., 109 F.3d 23 (1st Cir. 1997)	22

Contents

	Page
Simpson v. Federal Mine Safety and Health Review Comm'n, 842 F.2d 453 (D.C. Cir. 1988)	22
Sims v. Mulcahy, 902 F.2d 524 (7th Cir.), *cert. denied*, 498 U.S. 897, 111 S. Ct. 249 (1990)	7
Smart v. Ball State Univ., 89 F.3d 437 (7th Cir. 1996) .	13, 14
Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577 (1979)	21
Smith v. St. Louis Univ., 109 F.3d 1261 (8th Cir. 1997)	25
Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir.), *cert. denied*, 513 U.S. 1081, 115 S. Ct. 733 (1994)	19
St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915 (1988)	7
St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993)	10
Steiner v. Showboat Operating Co., 25 F.3d 1459 (9th Cir.), *cert. denied*, 513 U.S. 1081, 115 S. Ct. 733 (1994)	19
Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (9th Cir. 1996)	19

Contents

	Page
Swick v. City of Chicago, 11 F.3d 85 (7th Cir. 1993) ..	12
Talanda v. KFC Natl. Mgmt. Co., 6 A.D. Cas. (BNA) 1321, 1997 WL 160695 (N.D. Ill. April 2, 1997)	24
Thomas v. Denny's, Inc., 111 F.3d 1506 (10th Cir. 1997)	22
Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997)	15
Tschappat v. Reich, 957 F. Supp. 297 (D.D.C. 1997) ..	24
Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708 (2d Cir. 1996)	16
Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503 (11th Cir. 1989)	4
Wanamaker v. Columbian Rope Co., 108 F.3d 462 (2d Cir. 1997)	15
Ward v. Bechtel Corp., 102 F.3d 199 (5th Cir. 1997) ..	22
Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 109 S. Ct. 2115 (1989)	10
Welsh v. Derwinski, 14 F.3d 85 (1st Cir. 1994)	17
Williams v. Bristol-Myers Squibb Co., 85 F.3d 270 (7th Cir. 1996)	14, 28

Contents

Page

Williams v. J.B. Parks Wholesale Florist, Inc., 1997 WL 160194 (N.D. Tex. March 31, 1997) 6

Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 112 S. Ct. 2447 (1992) 11, 12

Wu v. Thomas, 996 F.2d 271 (11th Cir. 1993), *cert. denied*, 511 U.S. 1033, 114 S. Ct. 1543 (1994) 17, 18

Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) 13, 22

Statutes Cited:

29 U.S.C. § 623(d) 17

42 U.S.C. § 704(a) ..... i, 10, 25, 26

42 U.S.C. § 1981a(b)(3) 24

42 U.S.C. § 2000e-3(a) 6, 10, 17

42 U.S.C. § 2000e-5(f)(1) 11

Rule Cited:

Fed. R. Civ. P. 51 7

Other Authorities Cited:

Administrative Office of U.S. Courts, *Federal Courts Caseload Continues Upward Spiral* (Press Release March 12, 1997) 23

Contents

	Page
BLACK'S LAW DICTIONARY 61 (6th ed. 1990)	10
Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 282 (2d. ed. 1995)	10
1 AM. JUR. 2D *Actions* § 56 (1994)	11
1A C.J.S. *Actions* § 32a (1985)	11
WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (9th ed. 1986)	10

STATEMENT OF THE CASE*

Mattern sued Eastman, her former employer, alleging that the company violated Title VII of the Civil Rights Act of 1964 ("Title VII") by sexually harassing her, retaliating against her for complaining about the harassment, and constructively discharging her. She also alleged that Eastman's conduct constituted intentional infliction of severe emotional distress under Texas law. A jury in Marshall, Texas found that Mattern had been sexually harassed by coworkers but that Eastman had taken prompt remedial action. The jury also found that Eastman had neither constructively discharged Mattern nor intentionally inflicted emotional distress. On her retaliation claim, the jury found "that Eastman intentionally or willfully retaliated against Jean Mattern for filing a charge of discrimination and/or for filing this lawsuit" but went on to find that Eastman had acted without malice, willfulness, or reckless indifference to Mattern's rights. The jury awarded Mattern $50,000 in actual damages on the retaliation claim. The magistrate judge later awarded Mattern attorneys' fees, interest, and costs.

On appeal, the United States Court of Appeals for the Fifth Circuit, with Judge Dennis dissenting, held that Mattern had failed to adduce legally sufficient evidence of an "adverse employment action," an essential element of her retaliation claim. The court also held that several of the alleged actions Mattern complained of failed to support the verdict on other grounds. The Fifth Circuit reversed the trial court's judgment and rendered judgment in Eastman's favor. On Mattern's petition for rehearing and suggestion for rehearing *en banc*, no active judge of the Fifth Circuit requested a poll of the full court. Accordingly, her suggestion was denied, as was her petition for rehearing.

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* The petitioner will be referred to as Mattern. The respondent will be referred to as Eastman.

Mattern's statement of the case seriously misrepresents the facts. The first paragraph is devoted to describing her sexual harassment complaint. The details of the sexual harassment allegations, however, have nothing to do with the retaliation issue before the Court. Mattern also describes her accusations as established fact. She says she was "repeatedly assaulted by two senior company mechanics" and was "regularly" "spanked" by one, all in plain view of her supervisor. But the jury obviously did not accept Mattern's version of events. It found only that at least one of Mattern's coworkers sexually harassed her. That finding does not entitle Mattern's counsel to describe as "facts" what are, for the most part, hotly disputed allegations. The jury's verdict actually demonstrates that it discredited much of Mattern's evidence. For example, Mattern accused at least two coworkers, John Godwin and George Roberts, of sexual harassment. But as she points out, Eastman took disciplinary action only against Godwin. Yet the jury found that the company had promptly remedied the sexual harassment. The jurors thus could not have believed Mattern's accusations against Roberts.

Mattern likewise describes inaccurately the events leading to Godwin's separation from employment. She says that "high ranking company officials asked Godwin to take early retirement." *Petition* at 2. That is incorrect. The disciplinary committee that convened to decide the appropriate discipline for Godwin recommended discharge. IX. R. 235-39, 246-47 & Dx. 18. At *his* request, however, Eastman permitted Godwin to retire instead. *Id.* at 239.

Mattern's discussion of her retaliation claim is equally misleading. She describes every alleged instance of retaliation as though she had proven each occurred. But, again, the jury did not decide whether each incident happened as Mattern asserted or whether any of the incidents it did believe happened were motivated by retaliation. Rather, the jury simply found that Mattern had been retaliated against. Given its adverse findings on Mattern's constructive-discharge and intentional-infliction-of-emotional

distress claims as well as its decision that the retaliation it found was not willful, malicious, or recklessly indifferent, it seems unlikely that the jury believed all of Mattern's retaliation allegations.

Mattern also says she repeatedly complained about the alleged retaliation but that company officials responded there was nothing they could or would do about it. *Petition* at 4. She leaves out that those same officials testified that Mattern would not provide them the details they needed to take appropriate action to remedy any inappropriate conduct toward her. VII R. 288-89; IX R. 63-64, 246. She likewise does not mention the company's transferring her to another work group and threatening to fire any of her coworkers who retaliated against her. VII R. 174; IX R. 59-62, 138. Mattern finally says that the alleged retaliation "soon drove [her] from the plant." *Petition* at 3. But the jury found that she was *not* constructively discharged.

It is one thing to describe a party's version of the facts — either by specifically identifying the description as such or by explaining what some of the evidence was — and then to assume that version true for purposes of a legal argument. But it goes beyond proper advocacy to relate bare accusations as fact.

REASONS FOR DENYING THE WRIT

I.

THE CIRCUMSTANCES OF THIS CASE MAKE REVIEW INAPPROPRIATE.

The circumstances that led to the reversal of the jury's verdict make this case an inappropriate vehicle for review of the issue stated in the petition. Those circumstances include the jury's unchallenged findings against Mattern, the instructions given to the jury without objection, and the legal theory Mattern elected to pursue.

The jury found "that Eastman intentionally or willfully retaliated against Jean Mattern for filing a charge of discrimination and/or for filing this lawsuit." But the jury also decided that Eastman had *not* "violated [Mattern's] rights under Title VII with malice or willfulness or reckless indifference to those rights" despite the finding of intentional or willful retaliation. The jury went on to find that Eastman had not constructively discharged Mattern, meaning, under the instructions given to the jury without objection, that Eastman had not "made her working conditions so intolerable that a reasonable employee would feel compelled to resign." Because of that finding, Mattern's retaliation claim necessarily was limited to alleged conduct *other* than an actual or constructive discharge.

Her claim was further constrained by the legal theory she chose to pursue. To prove sexual harassment, she alleged a "hostile work environment": she attempted to show that a number of events, considered together, created a discriminatorily abusive working environment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986). " 'A hostile work environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merits.' " *DeNovellis v. Shalala*, __ F.3d __, 1997 WL 527912, at * 10 (1st Cir. Sept. 2, 1997) (quoting *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1511 (11th Cir. 1989)). The jury was instructed on and decided Mattern's sexual harassment cause of action under that theory. App. 8a-9a.

But Mattern did not plead or ask for submission of a hostile-work-environment theory on her retaliation claim. She alleged instead a number of distinct events each of which she hoped to prove constituted retaliatory action attributable to Eastman. The instructions the magistrate judge gave to the jury illustrate the difference in theories. The instruction on sexual harassment defined prohibited conduct as including conduct that "has the purpose or

effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile or offensive working environment" and covered the objective and subjective tests for hostile-work-environment harassment established by this Court in *Harris*. App. 8a-9a. The instruction on retaliation, in contrast, does not even hint at a hostile-work-environment theory: it told the jury that Mattern had to prove, among other things, an "adverse employment action" and did not define that term using any of the standards from hostile-work-environment cases. App. 9a-10a. Mattern did not object to the instructions, so she cannot now characterize her retaliation claim as one based on hostile-work-environment harassment.

Having chosen not to assert a hostile-work-environment claim, Mattern could defend the retaliation verdict only by treating separately each alleged retaliatory action. That is, the lower courts were obliged to assess each alleged incident of retaliation as though it were the only one on which the verdict was based, just as in the case of an employee who asserts claims for failure to promote and discharge. Moreover, because the jury failed to find a constructive discharge, Mattern could not justify the verdict as compensation for the loss of her job. The courts below were therefore confined to deciding whether an employee who had voluntarily left employment could obtain Title VII relief against a former employer for any one of the retaliatory actions asserted by Mattern considered in isolation from the others.

That Mattern did not plead or try to have submitted a hostile-work-environment retaliation claim is lost in the rhetoric of her petition, as it was in Judge Dennis's dissent below. Mattern groups the alleged retaliatory actions, often uses the term "harassment," and relies on cases concerning harassment to attack the Fifth Circuit's opinion and argue that the circuit courts are in conflict. She also relies on the Equal Employment Opportunity Commission's position that retaliatory harassment is actionable.

She quotes from and refers to Judge Dennis's dissent, which argued at great length that Mattern could prevail on a claim for hostile-work-environment retaliation without once acknowledging that she had not asserted such a claim. And she repeatedly contends that the Fifth Circuit "permits" retaliation, has "approved" and declared "lawful" a variety of retaliatory conduct, and has "declared an open season on employees who . . . oppose discrimination." The Fifth Circuit majority in fact said nothing about whether Mattern would have been able to recover under Title VII had she pursued a claim of hostile-work-environment retaliation and proved it under the analysis established in *Meritor Savings Bank* and *Harris*.[1]

Moreover, review by this Court could not change the outcome for Mattern. She waived any complaint about being required to prove an "adverse employment action" or about the definition of that term. The jury instructions required Mattern to prove an adverse employment action and defined such an action in the very way she objects to now:

> [A]dverse employment action could be defined as a discharge, a demotion, refusal to hire, refusal to promote, reprimand, [or] acts of sabotage . . . by employees against other employees, either condoned or directed by an employer for the purpose of establishing cause for discharge. Mere dirty looks or reluctance of co-workers to speak

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1. *Cf. Williams v. J.B. Parks Wholesale Florist, Inc.*, 1997 WL 160194, * 6 (N.D. Tex. March 31, 1997) (distinguishing Fifth Circuit's opinion and holding that hostile-work-environment retaliation is actionable); *Easley v. West*, 66 Fair Empl. Prac. Cas. (BNA) 1634, 1643 (E.D. Pa. 1994) (applying-hostile-work environment standards to retaliation claims under Title VII and Rehabilitation Act of 1973); *Henry v. Guest Servs., Inc.*, 902 F. Supp. 245, 251-52 (D.D.C. 1995) (applying hostile-work-environment standards to retaliation claim under Americans with Disabilities Act of 1990), *aff'd*, 98 F.3d 646 (table), 1996 WL 560362 (D.C. Cir. 1996).

> to an employee are not the types of adverse employment action prohibited by Title VII. Merely placing a memorandum regarding an employee's performance in his or her personnel file does not in itself constitute an adverse employment action.

App. 9a-10a. As the Fifth Circuit observed, Mattern did not object to that instruction before the magistrate judge, nor did she challenge it on appeal. App. 10a.

The failure to object to a jury instruction waives any error concerning the instruction. Fed. R. Civ. P. 51. Unobjected-to instructions, right or wrong, become the law insofar as the particular case is concerned, unless the party has preserved error by a motion for directed verdict or for judgment as a matter of law. *Moore v. Murphy*, 47 F.3d 8, 11 (1st Cir. 1995); *Sims v. Mulcahy*, 902 F.2d 524, 536 (7th Cir.), *cert. denied*, 498 U.S. 897, 111 S. Ct. 249 (1990); *cf. Boyle v. United Tech. Corp.*, 487 U.S. 498, 513-14, 108 S. Ct. 2510, 2519 (1988) (failure to object is not fatal when party who failed to object raises issue by motion for judgment or directed verdict); *St. Louis v. Praprotnik*, 485 U.S. 112, 118-20, 108 S. Ct. 915, 921-22 (1988) (same); *Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1392 n.6 (7th Cir. 1994) ("party need not object to jury instructions to urge a j.n.o.v. based on different standards"). So Mattern's challenge to the Fifth Circuit's discussion of adverse employment action could not help her. Even if this Court decided that the Fifth Circuit's definition was incorrect in the abstract, Mattern still would be bound by the very similar definition given to the jury, and her claim still would fail under that definition, as the Fifth Circuit correctly held.

In addition, several of Mattern's claims cannot succeed because of alternative holdings by the Fifth Circuit that she does not challenge. Her claims of retaliation based on alleged hostility from

fellow employees or having tools stolen fail because the Fifth Circuit held the evidence legally insufficient to permit a jury to find that those events were attributable to Eastman under *respondeat superior* principles. App. 11a. Her retaliation claim based on a missed pay increase, which the Fifth Circuit thought might be an adverse employment action in some situations but was not under the circumstances, App. 14a-15a, also fails independently of the adverse-employment-action holding. The Fifth Circuit held that the evidence was legally insufficient to show that the missed pay increase resulted from a retaliatory motive. App. 15a-16a.

In light of the case-specific circumstances that constrained the Fifth Circuit's review of Mattern's claim, the Court should deny the writ.

II.

THERE IS NO REAL AND SUBSTANTIAL CONFLICT IN THE CIRCUITS THAT WARRANTS THIS COURT'S REVIEW.

Upon separate consideration of the alleged actions on which Mattern based her retaliation claim, the Fifth Circuit found none of them independently actionable. The court applied a basic principle: some things that happen to an employee in the workplace simply cannot be sued on under Title VII .

The principle is hardly revolutionary. This Court has applied it twice in hostile-work-environment cases:

> [N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege"at of employment within the meaning of Title VII. *See Rogers v. EEOC*, [454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058

> (1972)] ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson* [*v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)] (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment."

Meritor Sav. Bank, 477 U.S. at 67, 106 S. Ct. at 2405.

> This standard . . . takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, "mere utterance of an . . . epithet which engenders offensive feelings in a employee," . . . does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII's purview.

Harris, 510 U.S. at 21, 114 S. Ct. at 370. In non-harassment cases like this one, the limiting principle is most often expressed by the requirement that a plaintiff must prove that a defendant took an "adverse employment action" because of a prohibited characteristic. Although this Court has never directly addressed whether such a requirement exists under Title VII, or defined

its scope outside the context of sexual harassment, it has used the phrase "adverse employment action" with no apparent reservations in other Title VII cases. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989).

The principle derives, moreover, from unambiguous statutory language. Section 704(a) of Title VII provides that:

> It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). To "discriminate" is, of course, to treat differently. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (9th ed. 1986) ("to make a difference in treatment or favor on a basis other than individual merit"); *see also* Bryan A. Garner, A DICTIONARY OF MODERN LEGAL USAGE 282 (2d ed. 1995). The word "against" means adverse or negative. BLACK'S LAW DICTIONARY 61 (6th ed. 1990) ("adverse to"); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (9th ed. 1986) ("unfavorable to"). Thus, by proscribing "discrimination against" employees, the statute prohibits employers from treating employees differently in an "adverse" or "unfavorable" way.

The notion that not every workplace occurrence that an employee dislikes can give rise to a Title VII claim also is related

to well-settled legal principles presumably incorporated into Title VII. First, Title VII authorizes, and Mattern sought, relief through a "civil action." 42 U.S.C. § 2000e-5(f)(1). To maintain a civil action, the law requires a legally cognizable injury as distinguished from and in addition to damages: "even where a wrongful act has caused pecuniary loss, a plaintiff will be without a remedy where he has suffered no legally cognizable harm." 1 AM. JUR. 2D *Actions* § 56 (1994); *accord* 1A C.J.S. *Actions* § 32a (1985). "It is the fact, clearly established, of injury to the complainant — not to others — which justifies judicial intervention." *McCabe v. Atchison, T., & S.F. Ry.*, 235 U.S. 157, 162, 35 S. Ct. 69, 71 (1914). The requirement at issue is often expressed in tort cases. *E.g., Niehus v. Liberio*, 973 F.2d 526, 531-32 (7th Cir. 1992) ("There is no tort without an injury."); *Jones v. Reagan*, 696 F.2d 551, 554 (7th Cir. 1983). Employment discrimination laws, at least those that permit recovery of compensatory and punitive damages, are generally treated as providing a tort-like cause of action. *See Commissioner v. Schleier*, 515 U.S. 323, 334-36, 115 S. Ct. 2159, 2163-67 (1995). Accordingly, the law requires a plaintiff in an employment discrimination case to show some actual injury to prevail on a claim. *E.g., Lawrence v. National Westminster Bank N.J.*, 98 F.3d 61, 72 (3rd Cir. 1996) (employee suffered no cognizable injury under Older Workers Benefit Protection Act where his employer asked him to sign an invalid waiver but he did not); *Adams v. Bethlehem Steel Corp.*, 736 F.2d 992, 994 (4th Cir. 1984) (allegations concerning mere existence of discriminatory policy without claims of application of policy to plaintiffs did not allege a cognizable injury under Title VII).

Second, limitation of Title VII's reach to legally cognizable injuries is consistent with the maxim *de minimis non curat lex* — "the law cares not for trifles." That "venerable maxim . . . is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231, 112 S. Ct. 2447, 2457-

58 (1992). As the Seventh Circuit has aptly put it, even in civil rights cases the law places "outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of." *Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993). Mattern's contention that any discrimination is actionable, no matter how slight or intangible its effects, cannot be squared with this Court's earlier rulings, the plain language of the statute, the traditional elements of an "action," or the *de minimis* doctrine.

Whether Title VII incorporates an adverse-employment-action requirement is not open to reasonable debate: it does. On the other hand, reasonable judges can differ and have differed about where to draw the line between actionable conduct and conduct that simply does not constitute "discrimination against" an employee. But that is not the kind of "conflict" this Court traditionally has exercised its discretionary jurisdiction to resolve. In fact, premature involvement by this Court, as the lower courts gradually work toward a standard through the normal process of case-by-case adjudication, could well be counterproductive.

A. The Views of the Other Circuits Courts

As Mattern points out, the Fourth Circuit applies essentially the same test for adverse employment actions as the Fifth Circuit. *Petition* at 12-13. The similarity is not surprising given that the Fifth Circuit's test was adopted from the Fourth Circuit's seminal opinion in *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.) (*en banc*) (Title VII prohibits only "ultimate employment decisions" and not "interlocutory or mediate decisions having no immediate effect upon employment conditions"), *cert. denied*, 454 U.S. 892, 102 S. Ct. 388 (1981). *See* App. 10a-11a; *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995); *see also Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 755 (4th Cir.), *cert. denied*, 117 S. Ct. 70 (1996).

The Sixth Circuit also applies a test that, like the Fifth Circuit's, looks for "ultimate employment decisions" before asking whether a particular event was discriminatorily motivated. *Cesaro v. Lakeville Community Sch. Dist.*, 953 F.2d 252, 254 (6th Cir.), *cert. denied*, 506 U.S. 867, 113 S. Ct. 195 (1992); *see also Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987); *accord Geisler v. Folsom*, 735 F.2d 991, 994-95 (6th Cir. 1984) (affirming district court's finding that the "predictable tension" that arose after others became aware of plaintiff's filing of EEOC charge was not adverse employment action prohibited by Title VII).

The Eighth Circuit recently cited the Fifth Circuit's decision below with approval in holding that a particular transfer and a poor employment evaluation were not adverse employment actions:

> Although "actions short of termination may constitute adverse actions within the meaning of the statute," *Smith* [*v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997) (relied on by Mattern)], "not everything that makes an employee unhappy is an actionable adverse employment action." *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996); *see Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir. 1997). Rather, the action must have had some adverse impact on [the plaintiff] to constitute an adverse employment action. *See Mattern*, 104 F.3d at 708; *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997). Even more recently, the Eight Circuit applied the Fifth Circuit's test without citing *Mattern*: "While the action complained of may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII."

Ledergerber v. Stangler, __ F.3d __, 1997 WL 545970, at *2-3 (8th Cir. Sept. 8, 1997); *see also Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) ("Changes in duties or working conditions that cause no materially significant disadvantage . . . are insufficient to establish the adverse conduct required to make a prima facie case."); *Bradford v. Norfolk S. Corp.*, 54 F.3d 1412, 1420 (8th Cir. 1995) (ADEA case).

Although the Seventh Circuit has not always been consistent in applying its adverse action standard, *see McDonnell v. Cisneros*, 84 F.3d 256, 258 (7th Cir. 1996) (noting "tension" in the cases), it plainly has one. Most often, the standard is described as requiring "a materially adverse change in the terms and conditions of employment." *Crady v. Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993); *accord Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-57 (7th Cir. 1994); *see also Smart*, 89 F.3d at 441 (negative performance evaluations alone do not constitute "adverse employment actions" under Title VII; "not everything that makes an employee unhappy is an actionable adverse action"). In *Williams*, the court noted the necessity of some rule of limitation:

> Otherwise, every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial.

85 F.3d at 274. The Seventh Circuit's test is therefore generally consistent with the Fifth Circuit's, despite a few decisions in which application of the test has resulted in outcomes different than in this case.

Mattern's contention that the Fifth Circuit's position conflicts with the Seventh Circuit's is thus incorrect. *Collins v. State of Illinois*, 830 F.2d 692, 703 (7th Cir. 1987), for example, simply recognized that "Title VII does not limit adverse job action to strictly monetary considerations"; the Fifth Circuit's standard does not suggest otherwise. *Reeder-Baker v. Lincoln National Corp.*, 834 F.2d 1373, 1375 (7th Cir. 1987), is likewise inapposite: whether the acts complained of there were sufficient to support a claim was not even raised. Finally, the cases cited in footnote five of Mattern's petition all involve claims of First Amendment violations and some involve specific allegations of "harassment." Mattern makes no attempt to explain why the test should be the same under the First Amendment and Title VII, and, as explained above, she has not presented a cognizable claim for "harassment."

The Second Circuit, contrary to Mattern's contention, has not "recognized a retaliation claim where an employer, allegedly for retaliatory reasons, had failed to ask a complainant if she wanted to work on a particular overtime assignment." *Petition* at 12 (citing *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 529 (2nd Cir.), *cert. denied*, 506 U.S. 965, 113 S. Ct. 440 (1992)). The Second Circuit affirmed summary judgment on the merits for the employer in that case; the issue of adverse employment action was either not raised or not ruled on. *Id.* In fact, the Second Circuit applies a test akin to the Seventh Circuit's test, but with more consistency. In the Second Circuit, to prove an adverse employment action, a plaintiff must show "a materially adverse change in the terms and conditions of employment." *Torres v. Pisano*, 116 F.3d 625, 639-40 (2d Cir. 1997) (employer's request that the plaintiff drop her EEOC charge, which "frightened" and "intimidated" her, was not an adverse employment action).[2]

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2. *Accord Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 465-67 (2d Cir. 1997) (ADEA protects employees from actions "injurious" to current employment or the ability to secure future employment; barring a discharged employee from using an office and phone to conduct a job hunt was only a "minor,

(Cont'd)

The Third Circuit, whose position on the issue Mattern does not address, recently adopted a standard for defining adverse employment action:

> Retaliatory conduct other than discharge or refusal to rehire is thus proscribed by Title VII only if it alters the employee's "compensation, terms, conditions, or privileges of employment," deprives him or her of "employment opportunities," or "adversely affect[s] his [or her] status as an employee." It follows that "not everything that makes an employee unhappy" qualifies as retaliation, for "[o]therwise, minor and even trivial employment actions that an 'irritable, chip-on-the shoulder employee did not like would form the basis of a discrimination suit.' " [quoting *Smart*, 89 F.3d at 441, and *Williams*, 85 F.3d at 274].
>
> Courts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee's terms, conditions, or privileges of employment into the doctrinal requirement that the alleged retaliation constitute "adverse employment action."

Robinson v. City of Pittsburgh, __ F.3d __, 1997 WL 386102, at *11 (3d Cir. July 14, 1997); *see also Nelson v. Upsala College*,

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(Cont'd)
ministerial stumbling block" and thus was not an adverse employment action under the ADEA); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 n.3 (2d Cir. 1996) (supervisor's "occasional nastiness, which other employees also were subject to," was not an adverse employment action sufficient to support a Title VII retaliation claim).

51 F.3d 383, 389 (3rd Cir. 1995). The court applied its standard to hold that "unsubstantiated oral reprimands" and "unnecessary derogatory comments" were not adverse employment actions under Title VII. *Robinson*, 1997 WL 386102, at *3.

The First Circuit addressed the adverse-employment-action issue in *Welsh v. Derwinski*, 14 F.3d 85 (1st Cir. 1994), a case relied on by Mattern. The court considered whether reducing the plaintiff's duties, which the plaintiff alleged eliminated the potential for him to obtain a status upgrade, was sufficiently adverse. In doing so it disagreed with the defendant's argument that "only discharge, demotion, or failure to promote can constitute an adverse employment action" under the Age Discrimination in Employment Act ("ADEA"). *Id.* at 86.[3] But the court also conceded that "not every unpleasant matter short of those [actions] creates a cause of action." *Id.* And the court went on to hold that the district court's "finding that plaintiff failed to make a prima facie showing of adverse employment action must stand" because reducing the plaintiff's duties did not prevent him from obtaining a status upgrade. *Id.* at 87. That approach is consistent with the Fifth Circuit's. *See* App. 11a (rejecting certain events as adverse employment actions "because of their lack of consequence").

The Eleventh Circuit, as Mattern correctly noted, has not defined "adverse employment action." *Wu v. Thomas*, 996 F.2d 271, 273-74 (11th Cir. 1993), *cert. denied*, 511 U.S. 1033, 114 S. Ct. 1543 (1994). But *Wu* did hold that it was not "clearly established" for qualified immunity purposes that retaliatory harassment, as opposed to sexual or racial harassment, was actionable under Title

3. Given the similarity between the anti-retaliation provisions in Title VII, 42 U.S.C. § 2000e-3(a), and the ADEA, 29 U.S.C. § 623(d), Eastman agrees with the argument implicit in Mattern's petition that the two probably should be interpreted similarly and thus that cases under one statute may be relevant in interpreting the other.

VII. *Id.* at 274-75. That holding is not relevant here because Mattern did not assert a retaliatory harassment claim. And the Eleventh Circuit's decisions before *Wu* show that it does place limits on actions for alleged retaliation. In *Bailey v. USX Corp.*, 850 F.2d 1506, 1508-09 (11th Cir. 1988), for example, the court affirmed the district court's judgment against a plaintiff who claimed that a negative employment reference was retaliatory. The court emphasized that because the plaintiff would not have been hired for the position for which the reference was provided anyway, he suffered no injury; and his removal from a civil service list of qualified candidates was temporary, so any harm was minimal. *Id.*; *cf. Jordan v. Wilson*, 851 F.2d 1290, 1292-93 (11th Cir. 1988); *see also Reynolds v. CSX Transp., Inc.*, 115 F.3d 860, 868 (11th Cir. 1997) (temporary replacement of the plaintiff that led to her being out of work for almost a week and being unpaid for the absence until almost six months later, was an adverse employment action sufficient to support Title VII retaliation claim).

The Tenth Circuit apparently has not adopted a verbal formula defining "adverse employment action." But it has held that various actions were not sufficiently adverse to support a claim and, in the process, suggested that a plaintiff must show some harm to employment status or opportunities. *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (retaliatory prosecution can have an adverse impact on future employment opportunities and therefore can be an adverse employment action under Title VII); *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1381-82 (10th Cir. 1994) (employer's change in its explanation of the basis for the plaintiff's removal after she filed an EEOC charge did not cause the harm the plaintiff complained of and thus was not an adverse employment action); *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 896 (10th Cir. 1994) (performance evaluation that was lower than previous rating was not an adverse employment action where there was no indication of injury or detriment because of the evaluation); *see also Mosley v. Pena*, 100 F.3d 1515, 1519 (10th Cir. 1996)

(employer's failure to settle the plaintiff's EEOC complaint was not an adverse employment action).

The Ninth Circuit's view is best described as inconsistent. In *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 869 (9th Cir. 1996), the court held that "[n]ot every employment decision amounts to an adverse employment action" and noted that "mere ostracism in the workplace is not enough to show an adverse employment action." While the case was brought under California's fair employment practices statute, that statute is interpreted consistently with federal anti-discrimination legislation, and the Ninth Circuit cited Title VII cases to support its holding. *Id.* at 866, 869 n.12; *see also Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1997) (transfer of employee with no effect on compensation was not an adverse employment action despite employee's characterization of transfer as demotion), *petition for cert. filed*, No. 97-364 (July 29, 1997); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 n.6 (9th Cir.) (questioning whether transfer from swing shift to day shift was adverse employment action where employee "was not demoted, or put in a worse job, or given any additional responsibilities"), *cert. denied*, 513 U.S. 1081, 115 S. Ct. 733 (1994).

But in *Hashimoto v. Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997), the court seemed to hold that completely inconsequential retaliation is actionable under Title VII: it allowed a negative employment reference to be sued on even though the plaintiff would not have gotten the desired job for other reasons. The court expressly rejected what it called the employer's "no harm, no foul" approach, concluding that the adverse job reference violated Title VII simply because it was a "personnel action" motivated by retaliatory animus. *Id.* at 674-76. *Hashimoto*'s recognition of a unique Title VII civil action that does not require a legally cognizable injury is wrong, but more importantly it is inconsistent even with other decisions from the same court. Until the court speaks *en banc* to reconcile its conflict, the Ninth Circuit must be considered as undecided on

whether a Title VII action requires proof of some actual negative effect on an employment relationship.

The District of Columbia Circuit sets one of the lowest thresholds for actionable conduct under Title VII and related discrimination statutes, using the formulation that an employer must engage in conduct "having an adverse impact on the plaintiff." *Passer v. American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991). In *Passer*, the employer's cancellation of a program to honor the plaintiff was held sufficiently adverse under the ADEA on the notion that the public humiliation involved "made it more difficult for him to procure future employment." *Id.* at 331. Yet in *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1423-24 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1105, 109 S. Ct. 3155 (1989), the same court held that veiled threats by a union official that he would "make it hard on those who filed this suit" and would withhold the plaintiff's application for a training program until he agreed to drop his charge of discrimination were not adverse actions under Title VII because the threats were not carried out and thus "had no effect." *Id.* at 1424; *see also Gary v. Long*, 59 F.3d 1391, 1396 (D.C. Cir.) (threats of adverse consequences that were never carried out constituted mere "saber rattling" insufficient to demonstrate *quid pro quo* harassment), *cert. denied*, 116 S. Ct. 569 (1995); *Henry v. Guest Servs., Inc.*, 902 F. Supp. 245, 251-52 (D.D.C. 1995) (plaintiff's receipt of a cartoon making light of his disability was not an adverse employment action because it was not severe and pervasive enough to alter the terms of his employment), *aff'd*, 98 F.3d 646 (table), 1996 WL 560362 (D.C. Cir. 1996).

B. The Fifth Circuit's View

The Fifth Circuit's approach to the adverse-employment-action issue is sound. Lost in Mattern's hyperbolic criticism of the court's use of the term "ultimate employment action" is any real sense of what the phrase actually means. It first requires some conduct by

the employer that has an actual negative impact on the plaintiff as an employee. Thus, if an employee who receives three warnings of deficient performance is discharged or denied a pay increase, the discharge or missed pay increase, either of which of course has an actual negative effect on the employment relationship, is actionable. The performance warnings themselves, however, caused no harm, although they might be evidence for one side or the other in an action based on the discharge or denied pay increase. But if an employee receives two performance warnings, improves, is not discharged, and receives the raises, there has been no actual negative impact on the employment relationship — no "discrimination against" the employee. The Fifth Circuit's focus on the "ultimate" employment decision simply looks for an actual impact on the plaintiff's employment, excluding those actions that could in the future but do not currently or inevitably impact it.

What Mattern seems to take the most issue with is the Fifth Circuit's implicit requirement that whether an action is adverse must be judged objectively as well as subjectively. Employment discrimination plaintiffs obviously prefer a standard under which the "adverse-ness" or "against-ness" of an employer's actions is decided conclusively by the employee's own view of it: "I do not like it; therefore it is adverse." But did Congress suggest or even permit such a standard?

The law generally disfavors basing legal rights on purely subjective standards, as illustrated by many of this Court's decisions. *E.g. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60, 113 S. Ct. 1920, 1928 (1993) (rejecting subjective standard for defining "sham" exception to *Noerr* antitrust immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19, 102 S. Ct. 2727, 2736-39 (1982) (rejecting subjective aspect of qualified immunity defense and opting for purely objective test); *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979) (objective and subjective expectation of privacy is required to complain of privacy deprivation under Fourth Amendment).

Courts, including this one, insist on objective showings under Title VII and other discrimination statutes as well. In a hostile-work-environment claim, for example, the Court requires plaintiffs to demonstrate "an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive." *Harris*, 510 U.S. at 21, 114 S. Ct. at 370. The Court also compels employers to meet objectively verifiable standards before asserting Title VII's bona-fide-occupational-qualification defense. *International Union, United Aerospace and Agricultural Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 201, 111 S. Ct. 1196, 1204 (1991). And all of the circuit courts require plaintiffs to meet an objective standard for proving a constructive discharge.[4]

A purely subjective test for adverse action under the employment discrimination statutes would have the same defects as similar standards in other settings. What constitutes differential negative treatment — "discrimination against" — for one person may be favorable treatment to another. Cases already on the books illustrate the point. *Compare Dollis*, 77 F.3d at 782 (plaintiff alleged that *denying* her a desk audit was an adverse employment action) *with Harris*, __ F.3d __, 1997 WL 384618, *2, *5 (8th Cir. July 14, 1997) (to be reported at 119 F.3d 1313) (plaintiff alleged that *receiving* a desk audit was an adverse employment action) *and Deavenport v. MCI Tel. Corp.*, 1997 WL 467160, *8 (D. Col. Aug. 13, 1997)

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4. *E.g.*, *Gartman v. Gencorp Inc.*, 120 F.3d 127, 130 (8th Cir. 1997); *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1514 (10th Cir. 1997); *Serrano-Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23, 26 (1st Cir. 1997); *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997); *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 733 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997); *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996); *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 89 (11th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482, 489 (7th Cir. 1996); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1084 (3rd Cir. 1996); *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir.), *cert. denied*, 117 S. Ct. 295 (1996); *Simpson v. Federal Mine Safety and Health Review Comm'n*, 842 F.2d 453, 462-62 & n.8 (D.C. Cir. 1988); *Yates v. Avco Corp.*, 819 F.2d 630, 636-37 (6th Cir. 1987).

(plaintiff complained of being "forced" to travel extensively) *with Lawson v. McPherson*, 679 F. Supp. 28, 32 (D.D.C. 1986) (plaintiff complained of being denied travel opportunities) *and Martin v. Frank*, 788 F. Supp. 821, 824 (D. Del. 1992) (plaintiff alleged discrimination in being forced to work two hours of overtime) *with Patel v. Allstate Ins. Co.*, 105 F.3d 365, 373 (7th Cir. 1997) (plaintiff complained of being denied permission to work overtime) *and Aldrich*, 963 F.2d at 528 (same). Mattern complained that a "final warning" was an adverse action. Other employees could complain, and no doubt have, that their employer discriminated by failing to warn them of deficient performance. Ease of assertion, difficulty of disproof, failure to give notice of liability-creating conduct — the law's traditional reasons for rejecting subjective standards of liability — apply fully to civil actions authorized by Congress in the employment discrimination statutes. Mattern offers no reasons why courts should hold otherwise.

Properly understood, the Fifth Circuit's test for adverse employment action requires only a current (or inevitable) objectively negative impact on the employment relationship. Most other circuits agree, even if they phrase the test differently, because they have found not actionable conduct that does not fit within it. Only one panel in the Ninth Circuit has arguably staked out a different position, but given the evident inconsistency with other Ninth Circuit opinions, that decision hardly gives rise to a clear conflict that warrants this Court's intervention.

C. Policy Concerns Support the Fifth Circuit's View

Practical policy concerns, of which Congress should not be assumed ignorant, also support the Fifth Circuit's standard. The Administrative Office of U.S. Courts reported a 25 percent increase in filings of civil rights employment cases in district courts and a 17 percent increase in appeals of such cases for fiscal year 1996. Administrative Office of U.S. Courts, *Federal Courts Caseload Continues Upward Spiral* (Press_Release March 12, 1997) (available at http://www.uscourts.gov/Press Releases/index.htm). Some judges have even called for the creation of special

employment courts because "the federal courts are flooded with employment cases." *Tschappat v. Reich*, 957 F. Supp. 297, 299 (D.D.C. 1997) (Sporkin, J.).

The effect of the Civil Rights Act of 1991 cannot be overlooked. It allows plaintiffs to recover up to $300,000 in compensatory and punitive damages, depending on the size of the employer, for violations of Title VII and the Americans with Disabilities Act of 1990. Even more important, money recoveries are no longer limited to the equitable restoration of lost wages and benefits but may include damages for less tangible harms such as "emotional pain, suffering, inconvenience, mental anguish . . . [and] loss of enjoyment of life." 42 U.S.C. § 1981a(b)(3). The former self-limiting feature of Title VII — availability of monetary relief only for defined, tangible losses — is gone, an absence that almost certainly accounts for the recent surge of cases discussing the adverse-employment-action requirement. There is now a hugely increased incentive for employees to sue when anything, no matter how minor or inconsequential, occurs in the workplace that might be attributed to discrimination. Congress of course could have chosen to allow actions under Title VII "involving trivial slights, real and imagined,"[5] but nothing in the language of the statute or its remedial scheme suggests that Congress did so.

III.

THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

Mattern argues that the Fifth Circuit's decision conflicts with three of this Court's decisions, *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993); and *Meritor Savings Bank v. Vinson*, 477 U.S.

5. *Talanda v. KFC Natl. Mgmt. Co.*, 6 A.D. Cas. (BNA) 1321, 1997 WL 160695 (N.D. Ill. April 2, 1997).

57, 106 S. Ct. 2399 (1986), and that its reasoning is inconsistent with the Court's decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729 (1990).

In *Robinson*, the Court held only that "former employees are included within § 704(a)'s coverage." 117 S. Ct. at 849. It did not, as Mattern puts it, "uph[o]ld a cause of action under section 704(a) based on a retaliatory job reference." The validity of that cause of action, beyond the question of whether it may be asserted by a former employee, was not before the Court. Moreover, there was no reason for it to be. As Mattern's counsel well knows, having appeared on the brief in *Robinson*, the negative reference there *did* cause an adverse employment action: the prospective employer to whom the reference was given did not hire the plaintiff. Brief for Petitioner, *Robinson v. Shell Oil Co.*, 1996 WL 341308, * 3 (U.S. 1996) (No. 95-1376). Because the Court expressed no opinion as to the validity of the cause of action at all, it certainly did not hold that the plaintiff would have stated a Title VII claim even if the prospective employer had hired him.[6]

The Fifth Circuit's decision is likewise not inconsistent with this Court's holding that former employees are covered by section 704(a). Indeed, the Fifth Circuit has held that the analogous retaliation provision in the ADEA applies to former employees. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088 (5th Cir. 1987). The fact that the hiring decision in *Robinson* was made by a different

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6. *Compare Smith v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997) (negative references causing potential employers to decline to hire plaintiff constituted actionable retaliation) *and Ruedlinger v. Jarrett*, 106 F.3d 212, 214 (7th Cir. 1997) (providing information to subsequent employer that caused it to fire plaintiff was adverse employment action) *with Bailey v. USX Corp.*, 850 F.2d 1506, 1508-09 (11th Cir. 1988) (because the plaintiff would not have been hired for the position he sought, he was not injured by his employer's provision of a negative reference) *and Hashimoto v. Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997) (a negative employment reference was actionable retaliation even though the plaintiff would not have gotten the job in any event).

employer than the one the plaintiff sued does not vitiate the adverse-employment-action requirement. Instead, it only reflects that in cases involving former employees, the terminology used in describing the limits of § 704(a) may have to be adjusted to account for the different circumstances involved in such cases. *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 n.13 (1973) (noting that the standards for establishing a *prima facie* case of discrimination will vary in different factual situations). In sum, *Robinson* did not address the relevant issue and the Fifth Circuit's decision does not conflict with it.

Mattern's argument that the Fifth Circuit's decision contradicts *Harris* and *Meritor Savings Bank* is nonsense. As explained above, both opinions establish that certain conduct, even if motivated by discriminatory animus, is not actionable; they are fully consistent with the underlying principle applied by the Fifth Circuit. Moreover, as also explained above, Mattern made no hostile-work-environment claim based on retaliation. Not being free to ignore the case actually before it, the Fifth Circuit properly did not consider the alleged events Mattern complained of in their totality under the standards established in *Harris* and *Meritor Savings Bank*. Likewise, the Fifth Circuit did not purport to define "discrimination" so as to exclude "[s]ystematic harassment," as Mattern contends. Mattern's focus on harassment means that she either is ignoring that she brought no such claim or that she would have the Fifth Circuit permit her to assert such a claim but avoid meeting the standards for it established by this Court. If she intends the latter, it is her position, not the Fifth Circuit's, that conflicts with *Harris* and *Meritor Savings Bank*.

Mattern's argument that the Fifth Circuit's decision contravenes *Rutan* highlights her mistaken view that there should be no limits whatsoever to retaliation liability despite authority from this Court and traditional legal doctrines to the contrary. In *Rutan* the Court held that employment decisions concerning "promotions, transfers,

and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees." 497 U.S. at 75, 110 S. Ct. at 2737. At the outset, *Rutan* sheds no light on the issue here because it was decided under the First Amendment not Title VII, and Mattern has not attempted to show that the same standards do or should apply under both. Although there are some inherent similarities between patronage discrimination and protected-activity discrimination, there are also different considerations involved in each, most prominently that one involves constitutional concerns and the limits of governmental power.

In any event, the Fifth Circuit's decision does not conflict with *Rutan* even if the same standards apply. The Court did not hold, as Mattern contends, that the First Amendment prohibits "*any* retaliation" without limitation. The Court did reject the Seventh Circuit's standard under the First Amendment (which is different than that circuit's standard under Title VII) holding actionable "only those employment decisions that are the 'substantial equivalent of a dismissal.' " *Id.* But it did not imply that there were no limits. In fact, it expressly found that employees subjected to certain actions short of discharge still may be "adversely affected" and explained some of the harms those employees could experience. 497 U.S. at 73, 110 S. Ct. at 2736.

The Fifth Circuit's test, as articulated in *Mattern*, does not require, as the Seventh Circuit had in *Rutan*, the "substantial equivalent of a dismissal" before a violation occurs. The court expressly recognized various kinds of decisions as actionable, including ones related to leaves of absence, promotions, and compensation, all of which are short of discharge. More specifically, and contrary to Mattern's apparent reading of the opinion below, the Fifth Circuit did not hold that promotions, transfers, and recalls after layoffs are not actionable under Title VII. The first and last of those actions plainly fall within the Fifth Circuit's non-exclusive

definition of "adverse employment action." And the court said nothing about transfers. But transfers are akin to hiring and promoting, or even demoting (which the Fifth Circuit also did not mention), all of which fit within the court's definition of adverse employment action: they all are the kind of "ultimate employment decisions," as compared to "interlocutory or mediate" decisions, that do or can have an objectively negative impact on the employment relationship.[7] In short, *Rutan* is inapplicable here, and the Fifth Circuit's decision does not in any case contradict it.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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7. As other circuits have recognized, a particular transfer may or may not be an adverse employment action depending on the circumstances and the real, objectively measurable impact on the employee. *E.g.*, *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997); *Davis v. City of Sioux City*, 115 F.3d 1365, 1369 (8th Cir. 1997); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-57 (7th Cir. 1994).